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Supreme Court of the United States.

OCTOBER TERM, 1954.

No.

HAROLD B. GORDON, *Petitioner,*

v.

MINERVA GORDON AND OTHERS, *Respondents.*

HAROLD B. GORDON, TRUSTEE, *Petitioner,*

v.

MINERVA GORDON AND OTHERS, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

Joseph Gordon, of Attleboro, Massachusetts, died testate July 8, 1943, leaving a widow who has since died, five daughters and one son, Harold B. Gordon, the petitioner. A trust was established under Articles 8 and 9 of his will. Harold B. Gordon was one of the beneficiaries and sole trustee under Article 8 and one of the trustees under Article 9 (*R. 16-24). Article 14 provided:

"If any of my said children shall marry a person not born in the Hebrew faith, then I hereby revoke

*R. are references to Massachusetts Supreme Judicial Court Record.

> the gift or gifts and the provision or provisions herein made to or for such child, and I direct that the portion or portions of my estate, and the interest or interests therein which I have by this will given to such child so marrying a person not born in the Hebrew faith shall be paid and made over to that person or persons who would have been entitled thereto under this will if such beneficiary had died before becoming entitled by the provisions hereof to such portion or portions, interest or interests, without leaving lawful issue." (R. 22.)

Harold, on May 11, 1949, married a woman admittedly "not born in the Hebrew faith." On a petition for a declaratory judgment (R. 1) the Probate Court ruled (R. 25) that Harold's interest in his father's estate had terminated under said provision and that all distributions of income and principal after the date of his marriage are vested in the other children, which was affirmed on appeal (Petition, p. 35).

The petitioner here asserts that there exist issues under the First and Fourteenth Amendments of the Federal Constitution; that the judicial enforcement of this fourteenth article of the will, depriving Harold of his interest in the estate, was unconstitutional in that the Probate Court decree is repugnant to the free exercise of his religious rights and deprives him of property rights in contravention of the Fourteenth Amendment.

Argument.

I.

Analysis of Article 14 of the Will.

Article 14 makes no requirement that any of the testator's children legatees shall profess or adhere to any par-

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ticular religious faith. Evidently he was willing to trust to the religious education he had given them as children in the family household that they would remain Jews. Any of the Gordon children, without forfeiture or penalty of any kind, could religiously remain a Jew or could become Catholic, Christian Scientist, a Jehovah's Witness, an atheist or anything else. The spouse of any child was not required to be of any specified religious faith. Without forfeiture or penalty of any kind, the proposed spouse might be Catholic, Christian Scientist, a Jehovah's Witness, atheist or anything else. The only limitation imposed by the will was that if the child legatee wished to retain an interest in Joseph's estate, on marriage the proposed spouse must have been a person "born in the Hebrew faith."

Article 14 is no religious limitation nor imposition of a religious requirement upon a child or upon the spouse of a child. It only offers an inducement for the marriage of a child to a person of a designated parentage. Joseph Gordon had a legitimate, natural, parental interest in the welfare of his children. A proper and happy marriage was, evidently, in his judgment a vital element for the happiness and well-being of a child. As an Orthodox Jew (R. 40) he had educated his children in the Hebrew faith (R. 89) and brought them up in an Orthodox Jewish household. Obviously he regarded children "born in the Hebrew faith" as being in a class which he favored. For religious, family, traditional and social reasons he apparently believed that marriage to a person also so born was what, as a parent, he wanted for each child. Article 14 provided that his estate should go to those of his children who married persons so born, and that any child of his who chose to marry a person born into another faith should no longer share his bounty.

This is a legitimate exercise of a parental right to influence a child's marriage in a direction which the father's experience led him to believe would best serve to achieve a successful marriage. It is the exercise of reasonable parental guidance for a child's marriage by a test he selected.

4 Restatement of Property, § 423C.
6 Am. Law of Property, pp. 661-662.
Graydon's Exec. v. *Graydon*, 23 N.J. Eq. 229, 237.

By the terms of the will "no exercise of religion is required, prevented, or hampered."

Goldman, petitioner, Mass. Adv. Sh. (1954) 745, 749.

II.

A Testator's Right and Power to Will.

A testator can dispose of his estate as he likes and impose such conditions and limitations on any gift he chooses to make.

Mass. G.L. (Ter. Ed.) c. 191, § 1.
Emery v. *Emery*, 222 Mass. 439, 443.
Polsey v. *Newton*, 199 Mass. 450, 454.
Rudd v. *Searles*, 262 Mass. 490, 493.

". . . a testator has a right to dispose of his own property with such restrictions and limitations not repugnant to law as he sees fit, . . ."

Damon v. *Damon*, 312 Mass. 268, 271.

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". . . the court has no right to take away limitations which he [the testator] chose to put upon his bounty."

Springfield Safe Deposit & Trust Co. v. *Dwelly*, 219 Mass. 65, 70.

"Within broad limits, the state has power to say what is devisable and to whom it may be given."

United States v. *Burnison*, 339 U.S. 87, 93.

III.

The Constitutional Question.

The same arguments, with the same citation of authorities as are here presented, were urged before the Supreme Judicial Court of Massachusetts.

In that Court's opinion, in disposing of the argument that the judicial enforcement of paragraph fourteen of the will violated the guaranty of religious freedom and was in contravention of the First and Fourteenth Amendments to the Constitution of the United States, that Court said:

"We are not impressed with these arguments. . . . All that the testator did was in effect to require that his property should not be received by a son or daughter who should marry one born to parents not of the Hebrew faith at the time of the child's birth. There is no condition based on the religious belief of anyone at the time of marriage." (Petition, p. 33.)

It then took occasion to point out that the same five federal cases which the petitioner now cites again on page 13 of the petition for certiorari "seem to us to involve quite different considerations from the right to dispose of property by will."

In thus holding that the enforcement of the fourteenth article of the will does not infringe upon any constitutional rights, the Massachusetts Supreme Judicial Court joined the majority of jurisdictions dealing with this question, in which it had been held that enforcement of such a provision in a will is not violative of the guaranties of the First and Fourteenth Amendments of the Federal Constitution.

**United States National Bank* v. *Snodgrass*, 275 Pac. (2d) 860 (Ore. Dec. 3, 1954).
In re Kempf's Will, 297 N.Y.S. 307; confirmed, 278 N.Y. 613.
Magee v. *O'Neill*, 19 S.C. 170.
In re Paulson, 127 Wisc. 612.
Delaware Trust Co. v. *Fitzmaurice*, 27 Del. Ch. 101.

A mere legacy inducement to adopt or to adhere to a particular religious belief is not a denial of religious freedom, nor is an inducement offered in a will to a legatee to marry a person belonging to a particular group depriving an offeree of constitutional rights.

The case from Virginia, cited on page 13 of the petition, does not fairly support the claim that it is contrary. *Madox* v. *Madox* considered the will on existing facts as compelling celibacy, and therefore void. It recognized that conditions in a restraint of marriage, "annexed to gifts and legacies, are allowed when they are reasonable in themselves, and do not unduly restrict a just and proper freedom of choice." In the *Drace* case the constitutional discussion seems to relate to the Pennsylvania State Constitution. *Clayton's Estate*, 13 D. & C. Rep. 413, decided

*This case is much like ours and deals most impressively with this constitutional issue.

later, held "a religious restriction operating only on the choice of a wife is too remote to be recognized as coercive of religious faith," and proceeded to point out that the *Drace* case is opposed to the weight of authority. *Devlin's Trust Estate,* which approved the *Drace* decision, really turned on the impossibility of holding a child of three years responsible for his religious education rather than dealing with the points here at issue. Compare *McBride's Estate,* 152 Pa. 192. See the discussion of these cases in *United States National Bank* v. *Snodgrass,* 275 Pac. (2d) 860, at 871.

Gordon's Article 14 is neither a direct nor an indirect restraint compelling another to profess or practise a designated religion chosen by the testator. That article is no interference with a legatee's religious freedom. It does not compel a legatee to profess the Hebrew faith in order to enjoy and retain all the benefits of the will. Article 14 does no more than to reward a legatee for choosing a spouse from the designated segment of the community which the testator esteemed. The purport of the article is only that, at the time of a marriage, the person whom a child marries must have been born in the Hebrew faith (even though such prospective spouse no longer adheres to that faith) to enable the legatee thereafter to continue to enjoy benefits under Joseph's will. No inquiry is required as to the religion of the prospective spouse. The only limitation imposed is as to the parentage of the prospective spouse.

It is only another example of the application of the testator's rights and powers to make a will as he chooses, which we have already discussed under II, that a testator has a right to dispose of his property as he likes and can impose any reasonable limitation he chooses on any gift he makes.

The constitutional guaranty of religious liberty does not vest in the individual freedom from all restraints and regulations when he pursues activities in the practice of his religious beliefs, even if the religion professed warrants the same. The constitutional guaranty of religious freedom is not beyond limitations. Regulations for good communal order, physical, moral and family standards and the protection and maintenance of family relationships directed to individual conduct are not proscribed.

Commonwealth v. *Prince,* 313 Mass. 223.
Prince v. *Massachusetts,* 321 U.S. 158.
Reynolds v. *United States,* 98 U.S. 145.
Davis v. *Beason,* 133 U.S. 333.
Baxley v. *United States,* 134 F. (2d) 937.

Indeed, this Court, in *Prince* v. *Massachusetts* (p. 165), expressly supported the right of parents to encourage their children in the practice of religious belief. There is no clear and present danger to constitutional rights in a parent possessing the right to reward a child when he or she marries in accordance with the parent's religious views.

In *Murdock* v. *Pennsylvania,* 319 U.S. 105, 109, this Court has even gone so far as to hold that Jehovah's Witnesses' unorthodox interfering efforts and acts to influence religious beliefs of third persons are entitled to the same protection as orthodox and conventional exercise of religion and involve no infraction of constitutional rights under either the First or the Fourteenth Amendments.

Far within the perimeter of these decisions is the enforcement of the limitation Joseph Gordon placed upon the bounty of his legacies to influence and guide his children to contract marriages he believed conducive to their welfare and happiness.

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Petitioner's attempt here is to extend some expressions of the restrictive covenant and segregation cases to impose federal control over parental relations in family life. To extend the principles of the civil rights cases to such situations would enlarge the constitution to control family life. It would prevent a father from dealing with his property in his family circle whenever it interfered with a child having absolute freedom to do as he wished. A father would be prevented from using his own means or authority to control or to direct his child religiously, in education, in choice of a trade, in marriage, or restraining his giving public expression of immature foolish opinions. It might even take away a property owner's right to will money to a Methodist Divinity School because it would deprive Jews, Catholics and other Protestant citizens of enjoying the same religious advantages as Methodists.

A parent has an acknowledged natural right and interest in his children's marriage as well as in his children's religion. The law in Massachusetts as shown, for example, in our adoption statute (G.L. (Ter. Ed.) c. 210), has recognized parental rights and obligations to direct and influence their children's religion.

> "The wishes of the parent as to the religious education and surroundings of the child are entitled to weight; . . ."
>
> *Purinton* v. *Jamrock*, 195 Mass. 187, 199-200.
> *Cf.* Parent & Child, 39 Am. Jur. § 50, p. 684.
> Parent & Child, 67 C.J.S. § 9, p. 632.

> "So also it is held that a father, to whom the law gives positive control over the marriage of his children while minors, and who is at all times their proper and natural adviser and counselor in marriage connec-

tions, may annex to a gift a condition that it shall be void if his child shall marry a particular person, or one of a specified class, as a Scotchman, a Papist or a Baptist."

Graydon's Exec. v. *Graydon,* 23 N.J. Eq. 229, 237.

". . . reasonable parental guidance, and yielding to the desire to maintain existing class distinctions, sanctioned the use of restraints directed against particular marriages to particular persons or classes."

4 Restatement of Property, p. 2473.

"In contrast to general restraints, an intention to restrain partially—that is, to limit the circumstances under which marriage may occur—is not unlawful, provided the test of reasonableness, as above defined, is satisfied. Parental guidance in the choice of a mate may serve a valid social purpose."

6 Am. Law of Property, pp. 661-662.

It is not unconstitutional for a parent to condition his affairs and property to influence his children in respect to religion or marriage so that even after his death his ideas of what is for their best interest and happiness may be of influence.

IV.

Restrictive Covenants and Segregation Cases.

Shelley v. *Kraemer,* 334 U.S. 1.
Hurd v. *Hodge,* 334 U.S. 24.
Barrows v. *Jackson,* 346 U.S. 249.

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These restrictive covenant cases relied on by the petitioner point out that the restrictive covenants which the Court refused to enforce were directed against "a designated class of persons" "defined wholly in terms of race or color," thus the enforcement by a Court of such a restrictive covenant deprived a whole class of people of the community, on the basis of race or color, of the equal protection of the law to exercise rights which all citizens are equally entitled to enjoy.

The segregation cases cited are even less in point. On the basis of race and color, segregation deprives a segment of the community from the privileges of education afforded by the government at the expense of all taxpayers, to which all of the community are entitled on a basis of equality.

Gordon's Article 14 applies only to his six children. Its enforcement does not result "in the denial of equal protection of the laws to other individuals" or a class of people. Article 14 takes no rights from any of Joseph's children, for a child has no legal right of inheritance in a parent's property. This provision of the testator's bounty provides a gift for each of these six children, subject to the limitation imposed. It gives each of them equally something which otherwise they would not have had. A testator, even where he has a family, has a right to dispose of his property as he pleases, to disinherit children or to impose conditions and limitations upon any gift he makes them. Article 14's only effect is to limit the period of sharing in the trust to the time while a child is unmarried or to a time when married to a person born in the Hebrew faith.

This Court, on page 13 of the *Shelley* case, points out clearly that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."

United States v. *Harris*, 106 U.S. 629.
United States v. *Cruikshank*, 92 U.S. 542.

The enforcement of the provisions of this will is no violation of the Constitution of the United States. It does not molest, restrain, prevent or deprive any class of people in a community from worshiping God according to the dictates of their consciences or from enjoying every right with which they are constitutionally invested.

V.

Trustee's Removal Petition.

The second petition, with reference to the removal of Harold B. Gordon as trustee, is disposed of, so far as it involves any constitutional question, by what has already been submitted herewith.

The Massachusetts Supreme Judicial Court had before it on the appeal a full transcript of all evidence, and, as the opinion pointed out, according to Massachusetts practice it decided the case on all the evidence thus reported (cases cited, Petition, p. 38).

There were many grounds presented that would have justified Harold's removal as trustee. The opinion emphasizes only two, either of which was considered sufficient by that Court for removal (cases cited, Petition, p. 40). The Court pointed out that "there has been a great deal of dissension between Harold and most of his sisters arising since his administration of the trust." Dissension alone would well justify removal of a trustee.

May v. *May*, 167 U.S. 310, 320.
Wilson v. *Wilson*, 145 Mass. 490.
Scott v. *Rand*, 118 Mass. 215, 217.

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Such removal is supported, but not solely, on the fact that Harold was no longer a beneficiary. On all the evidence the Court found that under the circumstances "it would not be for the best interests of the trust that he remain as trustee" and found "he is now unsuitable for the discharge of those trusts." After all, on the issue of a trustee's removal the issue is whether under all existing circumstances the continuance of the trustee in office would be detrimental to the trust.

Restatement of Trusts, § 199 (Comment e).

Certainly the question of petitioner's suitability or unsuitability to continue as trustee involves no constitutional rights or privileges. There is no constitutional right to be a trustee.

McAuliffe v. *New Bedford*, 155 Mass. 216, 220.
Adler v. *Board of Education of the City of New York*, 342 U.S. 485, 492.

Rather than raising nationally important constitutional issues, we venture to suggest that this petition is to serve to delay the day of Harold's removal so that in the meantime he may reap what gains a trustee may garner through extra months of office.

VI.

Summary.

(A)

The petition does not present any question of such public national constitutional importance as to justify the attention of this Court.

(B)

There is no such contrariety and diversity of decisions on the legal question involved as to demand a solution from this Court.

(C)

There is not actually a constitutional issue involved. The injection of constitutional arguments by the petitioner was such a strained performance that the Supreme Judicial Court of Massachusetts was well justified in characterizing them: "We are not impressed with these arguments."

VII.

Conclusion.

We very respectfully request that the Court deny the petitions for certiorari.

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